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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD (PARTIAL)* OF THE 453rd MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 19 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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* No summary record was prepared for the rest of the meeting.

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The discussion covered in the summary record began at 9.45 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 6 (continued)

1. The CHAIRMAN, having invited the Commission to consider paragraph 3 of article 6, said that the Canadian proposal that the word "sender's" in the first line be deleted did not seem to have met with any opposition and could be acted upon by the Drafting Group.

2. The observer for Sweden had suggested that the words "at the earliest possible time" be inserted before the word "unless" in the third line. However, difficulties of interpretation might arise because of the provisions of article 10(1), and he did not think that that suggestion was acceptable to the Commission.

3. The phrase "otherwise than by virtue of subparagraph 2(a)" was designed to solve the circularity problem. The concern expressed by the United Kingdom Government in its comments on article 6(3) (A/CN.9/347, p. 57) might have been somewhat alleviated by the changes made to article 10(1).

4. Mr. GREGORY (United Kingdom) said that the question whether notice of rejection had to be given when funds had not been received was still outstanding.

5. Mr. NEWMAN (United States of America) said he disagreed with the decision of the Working Group (A/CN.9/346, p. 45, para. 19) that a receiving bank was required to give notice of rejection if funds were not received, on the grounds that it was impracticable, for if the arrival of funds were merely delayed, the order could be executed with a later value date. Imposition of the rejection requirement could cause problems with payment orders from less developed countries, owing to differences in time zones. However, the Commission might wish to specify an end date after which payment orders would be deemed rejected or not accepted.

6. Mr. ABASCAL ZAMORA (Mexico) said that the Working Group had taken the view that the obligation to issue a rejection notice existed even if no funds had been received. There was an unresolved problem of sanctions in the event of a failure to give such notice. The earlier suggestion that a bank that failed to issue a rejection notice might be required to pay some seven days' interest had encountered strong opposition.

7. The Commission could either leave the paragraph as it stood, amend it to provide for the imposition of a sanction or delete it altogether.

8. Mr. GREGORY (United Kingdom) said that both a policy question and a drafting question were involved. As to policy, he felt that it was desirable to have such a requirement. The Model Law contained a number of provisions

(Mr. Gregory, United Kingdom)

that might still be of some value despite the absence of related sanctions. Once the policy decision had been taken, the matter could be left to the Drafting Group.

9. Mr. NEWMAN (United States of America) said that, as he understood it, article 6(3), taken in conjunction with article 6(2)(a), indicated that a bank was not obliged to issue a rejection notice if funds had not been received. If that were not the case, a bank receiving a payment order without funds would have to check on the following day and, if the funds had still not arrived, would have to reject the payment order and wait for a new one, an absurd situation.

10. Under the circumstances, he proposed that the text should be amended to make it clear that no notice of rejection was needed if the receiving bank had not received the necessary funds.

11. The CHAIRMAN said that there were two conflicting interpretations: that a notice of rejection was required when no funds had been received - the view taken by the Working Group - and that no notice was required under those circumstances. That point had to be clarified.

12. Mr. BURMAN (United States of America) said that it was necessary to clarify a relatively fundamental policy issue. There seemed to be an anti-bank attitude among some delegations and a tendency to pile more and more responsibilities on to the banks. The Model Law was intended, however, not so much to regulate bank operations as to promote trade.

13. Banks did not usually issue notices when funds were not received and since the customers in question were commercial customers, they could be expected to know the state of their bank accounts. The extra expenditure of time and money by banks that would be required if they had to issue rejection notices under those circumstances was not justified. It would only slow down commercial flows.

14. Mr. DE BOER (Netherlands) said that, if no funds had been received, there was no deemed acceptance. For some reason or other, the Working Group seemed to wish to introduce an obligation without a corresponding sanction. He endorsed the remarks of the United States representative.

15. Mr. CRAWFORD (Canada) said he supported the deletion of the provision regarding notice of rejection in the absence of funds on grounds similar to those advanced by the United States delegation. If that were done, however, there was a second minor amendment that should also be made. In article 4A of the United States Uniform Commercial Code, which also stipulated that no notice of rejection was required if no funds were received, there was a provision that "stale" payment orders, which had not been executed, should be cleared out after five days. A similar provision would be useful in the Model Law, since keeping payment orders pending indefinitely might lead to confusion and error.

16. Ms. KOSKELO (Observer for Finland) said that the arguments in favour of requiring a notice of rejection even if no funds had been received were not very strong and deletion of the provision was quite acceptable. She agreed, however, with the representative of Canada as to the need for a supplementary provision regarding "stale" payment orders.

17. Mr. ABASCAL ZAMORA (Mexico) said that the requirement seemed to conflict with banking practice and would probably have scant effect. Moreover, a receiving bank could incur significant costs in issuing rejection notices without any guarantee that the sums could be recovered. He agreed, therefore, with the delegations of the United States and Canada that there were no valid reasons for the obligation and supported the Canadian proposal that limits of validity for payment orders should be stipulated.

18. Mr. LIM (Singapore) said that he agreed with the United States delegation that the requirement placed an undue burden on the receiving bank. That would not be of great importance if no sanction were imposed, and the principle of exclusivity (article 16(8)) were maintained. However, if the provision under article 16(8) were removed and the duty to give notice of rejection were maintained in the Model Law, failure on the part of a receiving bank to comply with article 6(3) might give rise to a breach of statutory duty and lead to an action in tort. He thought that no obligation should be introduced without a corresponding sanction, whether the exclusivity rule was retained or not.

19. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the United States proposal whereby the text of article 6(3) would be amended to make it clear that no notice of rejection was needed if the funds had not been received.

20. It was so decided.

21. The CHAIRMAN invited the Commission to consider the question of the length of validity of a payment order. He suggested a period of seven to ten days.

22. Mr. CRAWFORD (Canada) said that the period in the United States Uniform Commercial Code was five days.

23. Mr. LE GUEN (France) said that it would be better not to set a specific number of days but rather to state that the parties could agree that the validity of a payment order would be limited in time.

24. Mr. GREGORY (United Kingdom) said that a problem would arise if there were no contractual relationship between the sending and receiving banks. The Model Law should thus prescribe a specific time limit of so many days.

25. Mr. HERZBERG (Observer for Israel) pointed out that, if a day were taken to mean a business day, five days would be the equivalent of one week.

26. Mr. ERIKSSON (Observer for Sweden) said he agreed that it was necessary to provide a fixed number of days, as suggested by the representative of the

(Mr. Eriksson, Observer for Sweden)

United Kingdom. There should also be provision, however, for freedom of contract between the parties.

27. The CHAIRMAN said that article 4A of the Uniform Commercial Code set the limit at the fifth business day for funds transfers. He asked the representatives of Canada, the Netherlands, the United Kingdom and the United States to prepare a draft text on the subject.

28. U NYI NYI THAN (Observer for Myanmar) said he agreed with the representative of France. It was necessary to allow flexibility in time limits to accommodate the conditions in developing countries.

29. Mr. KAKOLECKI (Observer for Poland) said he supported the United Kingdom's view, since failure to fix the number of days would give rise to uncertainty regarding how long a bank should allow a payment order to remain open. He himself preferred a time-limit of five days. He also favoured the addition of the phrase "unless otherwise agreed", since it would accommodate the concern expressed by the representative of France.

30. Mr. EFFROS (International Monetary Fund) said that consideration should be given to the fact that, in practice, the relationship between sender and receiving bank might consist of a series of transactions. If funds were not available, a number of payment orders might accumulate during the viable period. It might, therefore, be necessary to provide a rule to determine the order of priority for payment of those orders when funds became available, whether FIFO, LIFO or some other such method.

31. The CHAIRMAN said that the question had been discussed in the Working Group and elsewhere, but there had been a general agreement to let it drop. Normally the FIFO (first in, first out) rule would apply. If that was the general understanding, there was no need to discuss it in the Commission.

32. Mr. ABASCAL ZAMORA (Mexico) said he agreed with the representative of the United Kingdom that there was a need to place a time-limit on the validity of a payment order. However, the Model Law should also take account of the concerns expressed by the representative of France, which also had some justification. He was, in any case, not entirely clear why it was necessary to protect the senders of payment orders without funds.

33. Mr. HERZBERG (Observer for Israel) said there should be no time-limit in article 6(3). The matter of the order of the allocation of funds, as they became available, to a series of payment orders was extremely complex and varied from country to country. It should therefore be left to domestic law.

34. Mr. LIM (Singapore) said that the concerns of the representative of France and the observer for Myanmar might best be accommodated if the approach proposed by the representative of the United Kingdom were reversed. Thus the time-limit for validity of payment orders would normally be determined by national law or contractual arrangements. If, however, there were no such provisions, the Model Law would prescribe a time-limit of five days.

35. Mr. DE BOER (Netherlands) wondered what would happen when the five-day period expired and whether the payment order would then be cancelled by operation of the Law. It would be interesting to know what was provided in article 4A of the Uniform Commercial Code.

36. The CHAIRMAN said that, once the time-limit had been reached, the payment order became invalid.

37. Mr. LE GUEN (France) said there were two categories of payment order. In the first case, the payment order was sent through a funds transfer system, which, in the context of its own rules, would establish a limit on the validity of the payment order. That situation would therefore be governed by the law of contract, so there was no need to include a rule in the Model Law. In the second case, a payment order would be sent direct to a bank. Most banks applied their own rules. Consequently, even if there were no prior contractual relationship, the sender, by choosing a particular bank, would accept a priori the conditions of that bank. Again the law of contract applied.

38. He therefore saw no need to establish a time-limit in the Model Law. Nevertheless, he would be able to accept the proposal of the representative of Singapore.

39. With regard to the order of payment of payment orders, there were long-established procedures arising from the law of cheques and there was no need to address that question in the context of the Model Law.

40. Mr. HUANG Yangxin (China) pointed out that the Model Law applied to all forms of credit transfer. While a time-limit of five days might be sufficient in the case of electronic funds transfers, it would be insufficient in the case of paper-based transactions. It was necessary to allow for the needs of developed and developing countries alike. The time-limit should thus be left to individual countries to determine.

41. Mr. ABASCAL ZAMORA (Mexico) said he supported the proposal by the representative of Singapore. He wondered whether the phrase "as otherwise agreed" could be used, as it was used elsewhere in the text of the Law.

42. The CHAIRMAN asked the representative of Singapore to prepare a suitable text for consideration by the Commission.

43. Mr. NEWMAN (United States of America) suggested that the ad hoc drafting group should replace the words "sufficient to cover the amount" in article 6(2)(a) by "sufficient for payment of the amount". The reason was that the word "cover" was used a number of times with different meanings in the Model Law.

44. The CHAIRMAN recalled that the Commission had still to decide on the opening phrase of article 5. As the delegation of the United States had made a concession in accepting the concept of "deemed acceptance", the Commission might, perhaps, agree that article 5 should apply to the Model Law as a whole. To those delegations which wished to restrict the application of

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article 5 to articles 6 and 8, he put it that, in practice, those were the articles mainly affected. He therefore suggested that article 5 should begin "For the purposes of this model law".

45. Mr. GREGORY (United Kingdom) said that the Commission needed to explore the conflict between articles 5 and 17, as raised by the observer for Finland and addressed by the representative of Canada.

46. The CHAIRMAN said he agreed that article 17(2) might cause problems, but his feeling was that the Commission was following the path of confining the Law to credit transfers, in which case it might well decide to eliminate article 17(2) altogether. The Commission might thus adopt the introductory phrase to article 5, on the understanding that the question could be reopened if the decision in respect of article 17 so required.

47. Mr. ABASCAL ZAMORA (Mexico) said that the relationship with article 17 should not be left unresolved. He personally saw no contradiction between the two articles. Article 5 referred to the moment when the sender paid. Article 17(2) established when the beneficiary bank accepted the payment order at the end of the transfer. That was quite different.

48. Ms. KOSKELO (Observer for Finland) said that, in he view, there was a conflict between article 5(b)(ii) and article 17 in terms of reimbursement. She would explain her reasoning at a later stage.

49. The CHAIRMAN said he took it that the Commission wished to accept the phrase "For the purposes of this model law" at the beginning of article 5, subject to the condition he had already explained.

50. It was so decided.

51. The CHAIRMAN recalled that it had been agreed to add the following subparagraph to article 6(2): "When the receiving bank makes a debit to an account of the sender with the receiving bank in order to cover the payment order." He was pleased to inform the Commission that agreement had been reached to accommodate the suggestion made by the observer for Finland the previous day by replacing the words "in order to cover" by the words "as payment for", thus avoiding the word "cover".

52. If there were no comments, he would take it that the Commission wished to adopt that modification.

53. It was so decided.

Article 7

54. The CHAIRMAN drew the Commission's attention to the United States Government's proposal (A/CN.9/347/Add.1, p. 15) that the word "appropriate" in the third line of article 7(2) should be deleted. If he heard no objections, he would take it that the Commission wished to adopt that amendment.

55. It was so decided.

56. The CHAIRMAN drew attention to the proposal by the Government of France (A/CN.9/347/Add.1, p. 3) that the following sentence should be added to paragraph 2: "It must, specifically, effect the operation in the currency or unit of account stipulated by the sender." As indicated in the accompanying explanation, the purpose of the addition was to remind receiving banks that they should not take the initiative of converting funds received into another currency.

57. Mr. LE GUEN (France) said that the purpose of the amendment was to remind banks that, when they received a payment order in a specific currency, they must not convert the funds in question into local or any other currency. Although paragraph 2 as currently drafted stated that a bank must issue a payment order that was consistent with the contents of the payment order received, currency conversion was one of the most persistent problems relating to international credit transfers for banks in France.

58. Mr. NEWMAN (United States of America) said that article 7 was concerned with payments by the receiving bank either to an intermediary or to a beneficiary bank. Every effort had hitherto been made to avoid the question of currency conversion and he regretted that it had suddenly been brought up.

59. Regarding the French proposal, he did not see how a bank in France which received a payment order in foreign currency could send that foreign currency to the next bank in the chain, since he knew of no local multi-currency payment or fund transfer system there. In most cases, therefore, there would be conversion, but that would concern the beneficiary bank, which was not yet under discussion. In his opinion paragraph 2 was satisfactory and needed no addition.

60. Mr. LE GUEN (France) said that the object was to ensure that a bank receiving a payment order in a currency other than that of its own country would issue an order to the beneficiary's bank in the currency in which the order was received. The practice in France was that banks receiving a payment order in, say, United States dollars would normally arrange to issue a payment order in dollars. A bank which had no correspondent with dollar accounts simply refused the operation and left it to a better equipped bank. There were fund transfer systems in Europe, such as the French Sagittarius system, which were designed to transmit payment orders in a number of currencies.

61. Mr. VASSEUR (Banking Federation of the European Community) said that the French proposal should be viewed in the light of a case that had come before the courts in Paris. In December 1984, the Société Générale had given an order to a bank to transfer the sum of 2 million French francs to its branch in the United States of America. The order was to have been executed in French francs, but the United States correspondent bank of the Société Générale had converted the sum into United States dollars, without any instructions to do so. In January 1985, the dollar had been worth 10 French francs but the operation had been delayed and, in the interim, the dollar had fallen. That was the kind of situation the amendment was designed to remedy.

62. Mr. KOMAROV (Union of Soviet Socialist Republics) said that he preferred paragraph 2 as it stood. The wording took into account the problems of France since the word "appropriate" presupposed that the bank should take account of all aspects of the credit transfer and execute it in an appropriate manner. If the sentence proposed by the representative of France were added, it might be necessary to explain why the bank could or could not execute the credit transfer. Moreover, the problem of exchange rates would arise, which the Commission had decided not to deal with.

63. Mr. SOLIMAN (Egypt) said he supported the French proposal because it dealt with a practical problem that was extremely important for the developing countries.

64. The CHAIRMAN asked the United States delegation, in connection with the case cited by the representative of the Banking Federation of the European Community whether it was possible under United States law to make a payment in French francs and maintain a currency account in the United States of America.

65. Mr. NEWMAN (United States of America) replied that, in 1984, it had been illegal for a United States citizen to maintain a foreign currency account in the United States. The law had not been changed until 1990 and, while there might be one or two banks in the United States that offered currency accounts, they were far from usual. What had been done in the case of the Société Générale was normal banking practice in the United States.

66. The fundamental problem, however, was that it was the originator and the beneficiary that had to determine the flow of funds. In the case in question, the French bank had not realised what it was doing, because it should have known that the beneficiary did not maintain a French franc account in the United States of America.

67. Generally speaking, conversion to the local currency was appropriate, because that was the only way in which most banks could pay. If it were not deemed appropriate, it would be for the originator to make the fact known, and for the beneficiary to say where he wanted his funds. The operation should be pre-arranged and not flow in with fast payment order processing.

68. Mr. LE GUEN (France) said he wished to remind the members of the Commission that they were discussing the receiving bank. His proposal had nothing to do with the beneficiary bank, which was dealt with in article 9.

69. He agreed with the United States representative that, in the case mentioned by the representative of the Banking Federation of the European Community, the French bank had been in error in asking for a payment in French francs in the United States of America. The responsibility lay, however, with the beneficiary and not the intermediary bank. His delegation's proposal meant that a beneficiary bank which became involved in such a procedure should bear the consequences. The Model Law should not place the responsibility for ill-considered decisions on the intermediary banks.

70. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that a sender's purpose in stating that payment was to be effected in a specific currency was to guard against paying exchange commission, to avoid variations in exchange

(Mr. Safarian Nematabadi, Islamic Republic of Iran)

rates, etc. He understood and supported the French proposal, especially as regards payment orders made to intermediary banks.

71. Mr. NEWMAN (United States of America) explained that a bank did not always know if it was acting in the capacity of an intermediary or a beneficiary bank. When it processed a payment order it simply processed a payment order. The word "consistent" in article 7(2) should, in his view, cover the purpose of the French proposal.

72. In some places, conversion into the local currency was effected automatically and it would give rise to a great deal of extra work if intermediary banks were obliged to process transactions in currencies in which they did not usually deal. Orders of that sort needed to be set up in advance.

73. A bank could receive a payment order such as that referred to by the representative of France in one or other of two ways. Either the bank's French franc account would be credited or it would be instructed to debit the sender's dollar account. If it was then instructed to transfer the amount to another United States bank with which it had no French franc relationship, it could either convert French francs into dollars or see if the sender had a relationship of any sort with the beneficiary. The second option would involve the bank in a great deal of time and effort.

74. Mr. BHALA (United States of America) said that, in addition to the practical difficulties involved and the burden laid on the banks by certain demands, it was necessary to take into account the position of central banks. Even if its role were restricted to that of an intermediary bank, the Federal Reserve Bank, for example, would not be in a position to carry out the type of conversion required by the French proposal. The accounts it held for its customers were all in dollars. When a payment had to be made in a different currency, that was a matter for the originator and the beneficiary to work out.

75. Mr. GREGORY (United Kingdom) said that foreign exchange was an extremely sensitive issue and had to be handled carefully. He thought it implicit from the way in which the Model Law had been drafted that it was addressing the question of international credit transfers in a single currency. Although the principle of the French proposal was perfectly correct in so far as the basis of the Law was concerned, it would present difficulties if it was stated explicitly. He considered it preferable to leave article 7(2) as it stood.

76. Mr. NEWMAN (United States of America), replying to a question by the CHAIRMAN, said that, unless a United States bank had made prior arrangements with another bank, all payment orders in foreign currencies were automatically converted to dollars in his bank and in nearly every bank that he knew in the United States. United States banks were not in the foreign currency payment business. They used dollars. Multi-currency accounts had been introduced into the United States in 1990 only and, as far as he knew, only two banks were offering that service.

(Mr. Newman, United States of America)

77. Replying to another question by the CHAIRMAN, he said that, if his bank had a French franc account and if it received a payment order to credit it with French francs, it would of course do so.

78. The CHAIRMAN said that, in such a case, its action would be "consistent with the contents of the payment order", referred to in article 7(2).

79. Mr. BHALA (United States of America) said that the problems involved in the United States were more than merely operational and practical. Serious and sensitive central banking issues were involved in the matter. When payment orders came into United States banks, the Federal Reserve Bank might be involved and, if the credit were to be effected in foreign currency, the Federal Reserve Bank would be concerned about the extension of credit in foreign currency and also about the monetary policy of the country whose currency it was.

80. Mr. LE GUEN (France) said that the discussion was very enlightening on the differences between banking systems. Multi-currency arrangements were already quite common in Europe. The trend was growing and a common European currency might soon be in existence in Europe, parallel to existing national currencies. It seemed to him desirable that the Model Law should take such forthcoming developments into account.

81. He quite understood the concern of central banks, which were never particularly happy to see their national currencies circulating in foreign countries. That was not, however, the point at issue. The purpose of his delegation's proposal was to allow multi-currency payment systems to function where they existed. If a bank did not have the facilities to effect payment in a foreign currency, it could always refuse a payment order and other arrangements could be made. Where such arrangements did exist, however, as they did in Europe, the Model Law should not serve as a brake on them.

82. The arguments used against the proposal seemed contradictory. It was difficult to argue that the purpose of the proposal was already covered by article 7(2) and also that its implementation would place an extra burden on banks.

83. Mr. CRAWFORD (Canada) said that the Model Law should be aimed at establishing a sustainable position that was both practical and fair. The current difficulty appeared to be due to rivalry between currencies that, in some spheres, might be competing for the dominant role. All the Commission could do for the moment was to try to draft a Model Law dealing objectively with the basic needs of banks in dealing with international credit transfers.

84. The two words, "consistent" and "appropriate" in article 7(2) seemed to him to provide ample scope for interpretation and for the development of banking relations. All in all, the article gave banks flexibility of operation and encouragement to cooperate with other banks and he supported it.

85. The CHAIRMAN said that, while there was considerable sympathy for the French views and the reasoning behind them, the Commission considered it advisable to refrain from mentioning foreign-exchange matters in the

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Model Law. It was unable, therefore, to accept the French proposal, but agreed that any failure to comply with an order for payment to be effected in a specific currency or unit of account would constitute a breach of the payment order under article 7(2) and, more particularly, of the words "consistent" and "appropriate" therein.

86. Mr. LE GUEN (France) said that he would bow to the will of the majority. He could not help wondering, however, which countries' problems the Model Law was intended to solve.

87. Mr. BURMAN (United States of America) said that the Model Law was, of course, intended to solve the general problems of as many countries as possible. While he was fully aware of the problems encountered by France, and the problem under discussion had been expressed in terms of payment order issues between French sending banks and United States receiving banks, the whole question of trading and providing credit in foreign currencies was of concern to the central banks of most countries.

88. Mr. ABASCAL ZAMORA (Mexico) said he hoped that the absence of agreement on the problem under discussion would not jeopardize the Model Law. He also hoped that the Commission would not view the issue as finally settled, but would be ready to consider any formulation submitted during the days to come in an endeavour to meet the concerns of the delegations of both the United States and France.

The meeting rose at 12.35 p.m.